

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
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Court of Appeals, District of Columbia.

JANUARY TERM, 1934

No. 6034 **422**

RUTH H. VERTNER, APPELLANT,

vs.

EDMUND K. VERTNER ET AL., APPELLEES.

BRIEF FOR APPELLEE, EDMUND K. VERTNER.

EDMUND D. CAMPBELL,
JAQUELIN A. MARSHALL,
*Attorneys for Appellee,
Edmund K. Vertner.*

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Statement of Facts.

The facts as related in the brief of appellant Ruth H. Vertner are correct. Edmund K. Vertner, the appellee, a resident of Florida, and one of the several tenants in common of certain real estate in the District of Columbia, was named as party defendant in the present partition suit. He filed an answer to the bill of complaint admitting the allegations thereof. His wife, the appellant, a resident of Luray, Virginia, moved for leave to file an intervening petition which alleged failure on the part of the appellee to maintain and provide for her support and the support of their minor child. The appellant in her intervening petition, which she tendered to the court, prayed as follows: (1) That a writ of subpoena be issued against the appellee; (2) that if said subpoena was returned not to be found, that substituted service

of process as on a non-resident be had against the said appellee, as provided by statute in the District of Columbia, or in lieu thereof that she should have publication against said appellee for the purpose of acquiring jurisdiction; (3) that the appellee be required to maintain her, that the fund due to him from this proceeding be impounded in the hands of a trustee herein or some other suitable person to be appointed by the court, and that from the proceeds of that part due to the appellee she be paid a reasonable sum to reimburse her for the expenses of maintenance for herself and minor child, and that a reasonable part of said fund be impounded to provide for the future maintenance of herself and minor child; (4) that she be paid out of said fund a sum equivalent to her inchoate right of dower; (5) for such other relief as to the court might seem just and proper.

The motion for leave to intervene was denied and from that order of the court this appeal was taken.

ARGUMENT.

Appellant's claim to the right of intervention is based upon an alleged two-fold interest in the proceeds of the partition sale—first as a fund by which she might have satisfied her claim to maintenance, provided the court found that she was entitled to maintenance, and, second, because of an alleged inchoate right of dower.

It is freely admitted that the intervening petition tendered by the appellant sets forth a *prima facie* case for maintenance. It is also admitted that a wife has a right to maintenance without having first obtained a divorce, or even without grounds for divorce. Appellee submits, however, that the court below was correct in denying the motion for leave to intervene because it was without jurisdiction to pass upon the merits of a claim for maintenance in this partition suit and because a wife has no right to have dower

decreed in her husband's share of the proceeds of a partition sale.

(A) Claim to Maintenance.

According to the allegations of the tendered intervening petition, both husband and wife are non-residents of the District of Columbia, the marriage, however, having been performed in the District of Columbia. There is no allegation that any decree for maintenance has ever been entered in favor of the appellant against the appellee in this or in any other jurisdiction. Our Code provides for maintenance of a wife and child in Title 14, Chapter 3, Section 75 (Sec. 980 of the old Code). This Code provision is declaratory of the common law rule in force in Maryland and in the District of Columbia before the enactment of our Code.

The courts of the District of Columbia have consistently held that an action for maintenance is an action *in personam* rather than *in rem*.

In the case of *Rhodes vs. Rhodes*, 36 App. D. C. 261, 268, a wife filed a bill for maintenance in the Supreme Court of the District of Columbia alleging that she was a resident of the District of Columbia; that she had married the defendant in Colorado, and that the defendant had failed to provide for her maintenance. The defendant husband was personally served and filed an answer to the bill. The court held:

“It was not necessary to the jurisdiction in that proceeding that the defendant should have been domiciled in the District of Columbia. That he was found and served with process therein is all that was necessary.”

In a recent case decided by this court, that of *Bliss vs. Bliss*, 60 App. D. C. 237, 238, a wife brought a bill alleging that she was a resident of the District of Columbia, and that her husband, although a non-resident, had property in the District of Columbia; that they had been married in the

District of Columbia; that thereafter she had obtained a divorce in Reno, Nevada, but that it was procured by her through coercion on the part of her husband. She prayed that the divorce be declared null and void and that she be awarded maintenance. An order for service by publication was passed by the court, stating that the object of the suit was to secure "maintenance and support". The husband appeared specially and moved to vacate the order of publication. This motion was granted by the lower court, and the wife appealed from the order granting the motion.

The Appellate Court sustaining the lower court said:

" * * * the lower court granted defendant's motion and quashed the order of publication on the ground that the suit was one *in personam* and that the court had no power to authorize substituted service of process in the absence of a statute permitting it, and that section 378, Title 24, D. C. Code 1929, which authorizes substituted service in suits for divorce, does not apply in suits for maintenance; and from the order entered accordingly this appeal is taken. Stated briefly, therefore, the question for decision is whether a suit for maintenance is a proceeding *in personam* or a proceeding *in rem*. * * *

"The claim for maintenance is different from a suit to enforce a contract or a lien, and, under the Code provisions, there can be no attachment, seizure, or taking of the property until after the decree has passed, * * *,"

The court distinguished the case of *Thompson vs. Tanner*, 53 App. D. C. 3, relied upon by the wife, and said:

"The difference between that case and this is two-fold. There the action was for divorce, which is a proceeding *in rem* and in which a valid decree may be rendered without jurisdiction of the person of the defendant. Here the suit is for maintenance, that is to say, for a personal decree for money which, as we pointed out in the *Tanner* case *supra*, is essentially a proceeding *in personam*."

The court in the opinion then went on to say that the wife could not in any event secure maintenance in this jurisdiction until she had established the validity of her divorce in a court of competent jurisdiction. The decision below was affirmed.

Counsel for the appellee submit that the appellant's cause of action, if any, is an action *in personam* and not one *in rem*, and that before she can have the court subject her husband's property in the District of Columbia to payment of her claim, she must first establish a right to maintenance in a proper proceeding either in this jurisdiction or some other jurisdiction where she can obtain personal service of process. The right to maintenance being so distinctly a personal action, there is no provision in the Code of laws of the District of Columbia for service of process by publication or other substituted process in case the defendant cannot be served personally.

The intervening petition submitted by the appellant discloses no such definite interest in the property in question as is recognized in law to entitle one to intervention. The mere fact that a non-resident husband has property in the District of Columbia does not afford the courts of the District of Columbia such jurisdiction over the husband to enter a personal decree against him for maintenance even to the extent of his property physically located within the jurisdiction. The appellant is undoubtedly interested in the property of the appellee and in the outcome of the partition suit, the same as any ordinary creditor having no judgment or lien against the property of his debtor is interested in the disposition of his debtor's property; but this interest is not the type or character of interest in the subject matter of litigation that permits a third party to intervene and have a collateral matter adjudicated. See:

Horn vs. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569;

Wightman vs. Evanston Yaryan Co., 217 Ill. 371; 108 A. S. R. 258;

Brown vs. Saul, 4 Martin N. S. (La.) 434, 16 Am. Dec. 175 and note.

The prayers of the tendered intervening petition are significant in that the relief requested is practically the same as the relief sought in the case of *Bliss vs. Bliss, supra*, in that a sequestration of the husband's property was requested in both cases, the wife proceeding on the theory that her action was one *in rem* rather than one *in personam*.

The case of *Tolman vs. Tolman*, 1 App. D. C. 299, cited by the appellant in her brief, was decided before our Code provision for maintenance. The husband in that case, however, was a resident of the District of Columbia and voluntarily appeared and answered the bill which clearly distinguishes the case from the present one before the court.

Appellant claims in her brief that since the appellee is already subject to the jurisdiction of the court by reason of his answer filed in this partition suit any question of the jurisdiction of the court over parties defendant is beside the point. It is submitted, however, that to permit the appellant to intervene in this partition suit and take advantage of the appellee's appearance herein would be to allow her to do indirectly that which she cannot accomplish directly, since she is obviously unable to obtain personal service against the defendant in a separate action for maintenance in the District of Columbia.

Counsel for the appellant have been unable to cite any case in their brief in support of their contention that intervention in such a case should be granted by the court.

(B) Claim for Inchoate Dower.

In support of her contention that she is entitled to have an inchoate right of dower decreed in, and paid out of her husband's share of the proceeds of the partition sale, the appellant is unable to cite any authority, either statutory or by way of a reported decision. On the contrary the law in the District of Columbia appears to be well settled by the case of *Delvin vs. Esher*, 52 App. D. C. 30, 32. This was an appeal from a decree of the lower court overruling exceptions of a wife to the auditor's report, awarding the husband his distributive share in the proceeds of a partition sale. In that case, as in the instant case, the wife claimed the right to have her inchoate right of dower decreed in the proceeds of the partition sale. The Appellate Court affirmed the lower court's decree. Mr. Justice Robb in his opinion stated the issue in the case to be as follows:

“* * * the sole question being whether the wife of a tenant in common of real estate is entitled, in partition proceedings, to dower in her husband's share of the proceeds of the sale thereof.”

The court referred to the various sections of the Code of the District of Columbia pertaining to dower interests and the enforcement thereof, and pointed out that most of said provisions dealt with the vested dower interests of a widow rather than the “mere expectancy or possibility” of a wife's interest, and concluded:

“We think the conclusion irresistible that the terms ‘parties’ and ‘rights’ mentioned in Section 93 are defined and limited by the provisions of the preceding sections to which we have referred; in other words, that under the provisions of Section 90 the husband is the sole party interested, and hence entitled to his distributive share in the proceeds of the partition sale, as found by the trial court.”

The court quoted from *Randall vs. Krieger*, 23 Wall. 137, 148 (23 Law. Ed. 124), to define the character and incidents of inchoate dower, in which quotation it is stated that inchoate dower is not a natural right, but one created or given by law and subject to be increased, diminished, altered or wholly taken away by law.

Counsel for the appellee submit that this case is decisive of the question at issue here.

Conclusion.

It is respectfully submitted that the appellant has not shown any recognizable interest in this partition suit or in the proceeds of the sale of the property involved to permit the court below to allow her to intervene, either by reason of her unestablished claim to maintenance or by her claim to an inchoate right of dower. It is respectfully submitted that the order of the court below in denying the appellant's motion for leave to intervene was not error and should be affirmed.

Respectfully submitted,

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Attorneys for Appellee,
Edmund K. Vertner.

